

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LOWER EASTSIDE ENTITIES, LLC	:	ORDER
		DTA NO. 823839
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period September 1, 2005 through February 29, 2008.	:	

Petitioner, Lower Eastside Entities, LLC, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2005 through February 29, 2008. The Division of Taxation, by its representative, Daniel Smirlock, Esq. (Robert A. Maslyn, Esq., of counsel), brought a motion, filed January 20, 2011, seeking an order pursuant to 20 NYCRR 3000.6(a)(2) vacating a Demand for a Bill of Particulars dated December 30, 2010. Petitioner, by its representative, Gerald B. Lefcourt, Esq., filed its opposition to the motion on February 22, 2011.

After due consideration of the motion, the supporting affirmation of Robert A. Maslyn, Esq., the opposing affirmation of Gerald B. Lefcourt, Esq., and all the pleadings and proceedings had herein, Donna M. Gardiner, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner's demand for a bill of particulars should be vacated.

FINDINGS OF FACT

1. Petitioner, Lower Eastside Entities, LLC, filed a petition on September 1, 2010 seeking revision of a determination of sales and use taxes for the period September 1, 2005 through

February 29, 2008 on the basis that the audit methodology employed in a sales tax audit of petitioner was flawed and resulted in an assessment that was arbitrary and capricious.

2. In its answer, dated November 10, 2010, the Division of Taxation (Division) admitted that an assessment was issued as a result of an audit of petitioner, that petitioner timely filed a Request for a Conciliation Conference and that a conciliation order was issued. The Division denied petitioner's remaining allegations and affirmatively argued that petitioner owned and operated a restaurant or tavern in the state and that all receipts from sales of food and drink are presumed taxable unless otherwise established by petitioner. The Division affirmatively stated that it was entitled to employ an external index in order to estimate taxable sales because petitioner failed to maintain adequate books and records.

3. On or about December 30, 2010, petitioner served a Demand for a Bill of Particulars on the Division, which generally sought information in the following areas: statutory interpretation; details of the conduct of the audit; and names of fact witnesses and expert witnesses expected at hearing.

4. The Division brought the instant motion to vacate the demand on the basis that the demand is overly broad in that it seeks material that is evidentiary in nature, relates to matters of law and constitutes an impermissible request for discovery.

CONCLUSIONS OF LAW

A. The Rules of Practice and Procedure, 20 NYCRR 3000.6(a)(1), provide that a party may seek further details of the allegations in a pleading to prevent surprise at the hearing and limit the scope of proof with a demand for a bill of particulars.

B. An administrative law judge may be guided but not bound by the provisions of the New York Civil Practice Law and Rules (CPLR) (20 NYCRR 3000.5[a]). Since a wealth of case law

has been created under CPLR 3041, “Bill of Particulars in Any Case,” it is helpful to refer to that section for guidance in matters before the Division of Tax Appeals.

C. As stated by the Division in its motion, a bill of particulars is a document that amplifies the pleading, limiting the proof and preventing surprise at trial. It is not usable to obtain evidence (*Bassett v. Bando Sangsa Co.*, 94 AD2d 358 [1983], *appeal dismissed* 60 NY2d 962 [1983]; *State of New York v. Horsemen’s Benevolent and Protective Assn.*, 34 AD2d 769 [1970]).

A party is only required to serve a bill of particulars of that which the party has the burden of proof, not those matters which it need not prove upon trial (*Hydromatics, Inc. v. County Natl. Bank*, 23 AD2d 576 [1965]). In proceedings in the Division of Tax Appeals, a presumption of correctness attaches to a notice of determination, and the petitioner bears the burden of overcoming that presumption (*see e.g. Matter of Gucci*, Tax Appeals Tribunal, July 10, 1997, citing *Matter of Atlantic & Hudson*, Tax Appeals Tribunal, January 30, 1992). More specifically, in matters before the Division of Tax Appeals, the petitioner bears the burden of proof except as otherwise provided by law (20 NYCRR 3000.15[d][5]).

D. In this case, the issue involves a sales tax audit wherein the Division alleges that petitioner failed to maintain adequate books and records, which resulted in the Division’s use of an external index to estimate sales taxes due. The burden of proof in this case falls squarely on petitioner to demonstrate that it either maintained adequate books and records such that the Division would be required to use them in an audit or that the sales by petitioner were not subject to sales tax. Since a party is required to particularize only that of which the party has the burden of proof, and not those matters which it need not prove upon trial, petitioner’s demands for particulars concerning the Division’s position that petitioner’s receipts from the sales of food and

drink are taxable, and the Division's allegation that petitioner's failure to maintain adequate books and records authorized the Division to employ an external index to conduct a sales tax audit are properly vacated (paragraphs 1-9 of the Demand).

With respect to paragraphs 10-14 of the Demand, these paragraphs seek names and addresses of witnesses, which is information more in the nature of evidence. As a general rule, a bill of particulars may not be used to obtain the names of witnesses or evidentiary material (*State of New York v. Horsemen's Benevolent and Protective Assn.*), since it is not the purpose of a bill of particulars to identify and describe the evidence by which a party proposes to prove its claim (*Bassett v. Bando Sangsa Co.*). As such, these paragraphs are properly vacated. Lastly, with respect to paragraph 15, such paragraph seeks information that is both irrelevant and immaterial.

E. The Division of Taxation's Motion to Vacate the Demand for a Bill of Particulars is granted and the case will be scheduled for hearing forthwith.

DATED: Troy, New York
April 28, 2011

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE